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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCUS LAWRENCE WALKER,

Defendant and Appellant.

A151650

(Alameda County
Super. Ct. No. C178900)

Marcus Lawrence Walker appeals from convictions of attempted carjacking and making a criminal threat. He contends the trial court abused its discretion in admitting evidence of uncharged offenses; he was prejudiced by prosecutorial misconduct; the court impermissibly imposed double punishment; and the court abused its discretion in declining to strike a prior serious felony conviction for purposes of sentencing under the “Three Strikes” law. Additionally, based on recent statutory amendments, appellant seeks a remand to permit the trial court to consider striking the prior for purposes of a sentence enhancement that the court lacked discretion to strike at the time of sentencing. The Attorney General concedes the error with respect to double punishment. We will order that the judgment be modified to reflect that sentence on count 2 is stayed, remand the case for resentencing with respect to the enhancement, and otherwise affirm the judgment.

BACKGROUND

Appellant was charged with attempted carjacking (Pen. Code, § 215, subd. (a))¹ and making criminal threats (§ 422), with allegations that he had suffered three prior felony convictions—assault with a deadly weapon (§ 245, subd. (a)(1)) in 2006, and second degree robbery (§ 211) and grand theft person (§ 487, subd. (c)) in 2007—served a prison term within the meaning of section 667.5, subdivision (b), for each of the first two priors, and due to the second had to be sentenced pursuant to sections 1170.12, subdivision (c)(1), and 667, subdivision (e)(1).

The charged offenses arose out of an incident that occurred on the evening of June 4, 2016, after Roberto Lovato was involved in a minor traffic accident and pulled over to exchange insurance information with the driver of the other car. Lovato pulled over behind the other car and stood with the young couple from the other car on the sidewalk on the passenger side of the cars. As he was bent over the hood of the car writing down insurance information, the young man said, “Hey, he’s taking your car.” Looking up, Lovato saw appellant, whom he identified at trial, in the driver’s seat of his car “looking for the keys in the ignition.” When Lovato asked what he was doing, appellant got out and told Lovato to give him the keys.

Lovato, who was testifying through an interpreter and said he spoke English “[f]ifty percent,” understood what appellant was asking for and told him to calm down. Appellant pointed “a type of gun . . . with a barrel,” at him and said, “Motherfucker give me the keys.” The girl from the other car said, “He’s not playing . . . he’s armed.” Scared, Lovato told appellant again to relax. Appellant said “if you don’t, I’ll kill you,” then lifted his jacket up and took out a small revolver and pointed it at Lovato. Lovato testified that appellant took this second gun out with his left hand, then passed it to his right hand; he did not know what happened to the first gun, as everything was happening fast, he was nervous, and he did not “pay attention to everything he’s doing.” When appellant pointed the second gun at Lovato, the couple from the other car “ran away.”

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Lovato took three steps backwards, then ran a block away as appellant followed for “about 15 steps” and then returned to Lovato’s car.

The other driver, who had Lovato’s driver’s license, returned; she had called the police and they arrived about three minutes later. Lovato led them back to his car. Appellant was in the driver’s seat of the car, leaning over the ignition. When the police turned on their sirens, appellant got out of the car and walked behind it toward some bushes until the police “put the light on” and told him to get down, which appellant “didn’t want” to do.

Lovato testified that appellant was “very angry” and aggressive when he demanded the car keys. He did not yell but spoke “loud . . . not that loud, but, you know, aggressively.” Lovato was not sure the first weapon was a gun but was sure the second one was, and was positive appellant had two weapons. Lovato had seen “two kids from the house” in front of which the cars had pulled over go inside, but did not talk to them, and testified that they were inside during the incident with appellant.

Wendy Valdespino testified that she and her brother M.V. arrived home that night to find two cars in front of the house, one blocking the driveway, and an older man and young couple standing on the sidewalk between the cars. Wendy parked behind them, the people told her they had been involved in a collision and asked if she wanted them to move, and she said no. She went into the house, while M.V. remained outside getting the dogs’ food. From inside, Wendy heard M.V. scream, “What the fuck are you doing?” She looked out and saw appellant walk up to Lovato’s car and try to get in.² After appellant opened the car door and M.V. yelled, appellant walked toward M.V. and, from the gate in the fence at the sidewalk, said, “I’m not fucking playing with you. Go inside.” Appellant opened his suit jacket, reached with his right hand toward his right hip, pulled out and pointed at M.V. something that Wendy thought was a gun because it appeared to be black, metal, and heavy. Wendy opened the front door and told M.V. to come inside

² Wendy described the man involved in this incident and testified that the person she saw arrested was him, but she did not identify him in the courtroom at trial.

and appellant pointed the gun at her, telling her and M.V., “I’m not playing, I will shoot you.” At this point, the couple was still by the cars and Lovato was “slowly walking back” toward a neighbor’s fence. Appellant had not yet said anything to the people involved in the car accident.

Wendy and M.V. watched what was happening from her bedroom window, which Wendy said was closed. Appellant pointed the gun at Lovato, then at the couple, said something to the couple and the couple got in their car and left. Appellant pointed the gun “back at” Lovato, who was about three feet away from him. Wendy could not hear what appellant said but saw his mouth moving; she did not see Lovato’s mouth moving but testified that she was paying attention to appellant and did not know if the two were having a conversation back and forth. After about a minute, Lovato ran. Appellant got back in the car and appeared to be looking around for something. Wendy called 911. When the police arrived, appellant had started to walk away from the car, “try[ing] to act like he was just walking in the street.” He had only gotten to the house next door when the police stopped and arrested him.

Wendy did not remember telling a defense investigator that she did not see appellant point a gun at Lovato. She did not see a second gun. She testified that appellant looked drunk, but not “falling over” or having trouble walking. Asked why she testified that appellant was “for sure drunk,” she said, “[b]ecause earlier in the day” her brother and mother had seen him.

M.V. testified that when he and Wendy got home, Lovato asked Wendy if he needed to move his car, she said no, and they pulled into the driveway and parked there. After Wendy went inside, as M.V. was getting the dogs’ food, he noticed a man cross the street get into the second of the pulled-over cars, where he appeared to try to start the car or grab something from it. M.V. said to him, “what the fuck are you doing?” The man, whom M.V. identified as appellant, pointed something at M.V. that M.V. thought was a gun and said, “Go inside or else I’m going to shoot you.” M.V. testified that appellant was at the driver’s side of the car, in the “vee” between the open door and body of the

car, and did not walk toward him. Wendy opened the door of the house and M.V. went inside.

M.V. testified that he saw appellant point the gun at the couple and at Lovato (although he was not sure in which order) and say something to each of them that M.V. could not hear. The couple got in their car and left, then Lovato walked away quickly. Appellant starting looking for something in the car, “trying to start the car up I guess.” M.V. initially testified that he made these observations through the window after he had gone inside the house. At other points, he testified that by the time he went inside, the couple and Lovato had already left and all he saw from the window was appellant looking for something in the car. He testified that the window was open.

M.V. testified that he had seen appellant that morning, at which time appellant appeared to be drunk, walking “tilted,” stumbling and mumbling, and trying to interact with the family’s two pit bulls despite their aggressive barking. M.V. saw appellant again in a store around 3:00 p.m. He had not seen him before that day.

M.V. denied telling the police that he did not see appellant with a gun. He acknowledged that the police video showed him saying he was “not sure” when asked if he saw the gun, telling the police he was far away and saying the couple and Lovato had seen it, but testified that he said he was “not sure” because he was not entirely sure what appellant was pointing at him, although he was sure he saw a dark object in appellant’s hand. He testified that no one yelled “he’s got a gun,” and that he did not see everything that happened between appellant and the people outside because part of the time he was hiding in the hallway and not watching.

According to the testimony of responding police officers, when arrested, appellant was not in possession of any weapons. A baggie found next to appellant contained suspected methamphetamine. Despite a search of the street in areas where witnesses had seen appellant, including under cars and in yards, no firearms were found. The officer who transported appellant to jail testified that he did not appear intoxicated, but acknowledged that at one point she “held [appellant] up and said, [h]ey are you on something right now?”

The defense investigator testified that Wendy told him she did not see appellant point a gun at Lovato.

Appellant did not testify. Defense counsel's argument to the jury focused on inconsistencies and contradictions within and between witnesses' accounts, and suggested that appellant, "high and drunk," got into or leaned into an "abandoned car, looking for God knows what, turning everything inside out," and, when confronted by Lovato or M.V., got out, said something and "pull[ed] out something that people mistook for the gun," but never actually pulled a gun on Lovato, threatened him or attempted to carjack him.

The jury found appellant guilty of the charged offenses, and the court found the prior robbery conviction true and denied appellant's motion to strike the prior. Appellant was sentenced to a total prison term of 10 years, consisting of the midterm on count 1, doubled due to the strike prior (five years), a concurrent term of four years on count 2, and a term of five years for the prior felony (§ 667, subd. (a)(1)). The court stayed a one-year term for the prior prison term (§ 667.5, subd. (b)).

DISCUSSION

I.

Appellant contends the trial court abused its discretion by admitting evidence that he threatened Wendy and M.V. as well as Lovato. He contends this "other crimes" evidence was inadmissible under Evidence Code section 1101, which "prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*).)

Appellant forfeited this issue by failing to raise it in the trial court.

Appellant claims the issue is cognizable on appeal because it was raised in an in limine motion, and further objection was not necessary or warranted because of the court's "adverse ruling" during argument on the motion. As appellant points out, an issue is preserved if "(1) a specific legal ground for exclusion was advanced through an in limine motion and subsequently raised on appeal; (2) the in limine motion was directed to

a particular, identifiable body of evidence; and (3) the in limine motion was made at a time, either before or during trial, when the trial judge could determine the evidentiary question in its appropriate context.” (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 210–211.)

Neither appellant’s written motion nor his argument suggested that evidence of threats against Wendy and M.V. constituted inadmissible other crimes evidence. His written motions in limine included a request to “[e]xclude evidence of defendant’s or any defense witness’s uncharged incidents, involving arrests, detention, or investigation, and charged incidents that did not result in convictions. Such incidents constitute impermissible character evidence and would be unfairly prejudicial to defendant. (Evid. Code, § 1101(a); [*Ewoldt, supra*,] 7 Cal.4th 380; Evid. Code, § 352.)” The only “identifiable body of evidence” mentioned in the motion—“uncharged incidents, *involving arrests, detention, or investigation, and charged incidents* that did not result in convictions”—was not understood by anyone at trial as applying to the threats against these witnesses. Discussing the motions in limine, the court noted, “there’s no uncharged incidents . . . [s]o that’s granted.” The prosecutor agreed that there were no uncharged incidents, and defense counsel said nothing to the contrary.

In a separate discussion concerning video from the body camera of the first responding police officer, defense counsel argued that a portion of the video showing the officer’s contact with Wendy and M.V. after appellant’s arrest was inadmissible hearsay.³ The court excluded this portion of the video because the witnesses would be testifying as to their observations of the incident, noting that it might become relevant for

³ Defense counsel argued that the witnesses’ statements were made in response to police questioning, after appellant had been arrested, and did not come within any exception to the hearsay rule; the prosecutor sought admission of the video as relevant to show the “impact of the defendant’s conduct” because it showed the witnesses’ demeanor and emotion. The court saw the witnesses’ fear as potentially relevant to the threat count and whether appellant in fact had a gun, but after viewing the video ruled, as indicated above, that this portion would be excluded

Defense counsel did not object to the initial portion of the video showing the arrest.

impeachment if their descriptions differed from what the video showed them telling the officers. There was no reference in the discussion to threats against M.V. and Wendy as other crimes evidence within the purview of Evidence Code section 1101.

In short, appellant's in limine motions neither identified the body of evidence underlying the claim he seeks to raise on appeal nor gave the court an opportunity to "determine the evidentiary question in its appropriate context." (*People v. Whisenhunt*, *supra*, 44 Cal.4th at pp. 210–211.)

Appellant seeks to avoid forfeiture by arguing that trial counsel's failure to object to the evidence of threats against M.V. and Wendy constituted ineffective assistance of counsel. Under the familiar standard, appellant bears the burden of proving his attorney's performance " " " " "fell below an objective standard of reasonableness . . . under prevailing professional norms" " " " " and "a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mickel* (2016) 2 Cal.5th 181, 198, quoting *People v. Lopez* (2008) 42 Cal.4th 960, 966.)

With respect to defense counsel's competence, we are not convinced the threats toward Wendy and M.V. can properly be viewed as "other crimes" evidence under Evidence Code section 1101. "California law has long precluded use of evidence of a person's character (a predisposition or propensity to engage in a particular type of behavior) as a basis for an inference that he or she acted in conformity with that character on a particular occasion:" (*People v. Walker* (2006) 139 Cal.App.4th 782, 795.) The evidence is most often of past conduct, and "[c]ases sometimes describe Evidence Code section 1101(b) evidence as 'prior offenses' or 'prior bad acts,' " but "[t]he conduct may also have occurred after the charged events, so long as the other requirements for admissibility are met." (*People v. Leon* (2015) 61 Cal.4th 569, 597; *People v. Balcom* (1994) 7 Cal.4th 414, 425.) In either case, the danger of other crimes evidence is that it "produces an 'over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts' "; a " "tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from

other offences’ ” or a risk that “ ‘ “the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor.

[Citation.]” ’ ” (*People v. Thompson* (1980) 27 Cal.3d 303, 317 (*Thompson*), disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260.)⁴

In the present case, the “other offenses” did not occur on a separate occasion but rather as part of the same incident as the charged offenses. Even assuming the threats M.V. and Wendy described satisfied all the elements of a criminal threat under section 422—which the prosecutor here made no attempt to demonstrate—there is no evidence *about disposition* to be drawn from evidence that appellant threatened several people, rather than just one, during a single incident. Evidence that appellant threatened M.V. and Wendy *during the course of the incident involving Lovato* is simply evidence of the circumstances of the charged crime. Contrary to appellant’s characterization, the prosecutor’s theory was not that appellant “ran haphazardly through a neighborhood—possibly brandishing a weapon—threatening multiple people but escaping prosecution for all but one crime,” but that the crime appellant committed was particularly egregious because it involved unlawful conduct toward multiple people. Excluding evidence of

⁴ Appellant asserts that *Thompson, supra*, 27 Cal.3d 303, is “on point.” It is not. The issue in *Thompson* was admissibility of evidence of a robbery the defendant committed *almost two weeks after* the charged offenses. Appellant argues that *Thompson* rejected the theory that “ ‘if a person acts similarly in similar situations, he probably harbors the same intent in each instance.’ (*Id.* at p. 319.)” The court rejected the quoted contention because the subsequent offense was insufficiently similar to the charged crimes to support an inference that the intent to steal demonstrated in the latter suggested the defendant had the same intent in the former. (*Id.* at pp. 319–321.) After discussing the ways in which the two incidents were *not* similar, and noting that evidence of the subsequent robbery would entail “great prejudice” to establish “limited similarity” on a “narrow issue,” the court stated, “Evidence that an individual intended to steal car keys on one occasion does not, by itself, substantially tend to prove that he intended to steal them on a second occasion. The only tendency it establishes is the impermissible inference that he has a ‘disposition to commit’ such crimes.” (*Id.* at p. 321.)

The situation in the present case is entirely different, as all the evidence pertains to a single incident.

appellant's threats to M.V. and Wendy would have artificially limited the jury's view of the charged offense as it unfolded.⁵

Moreover, we see no reasonable probability that a more favorable outcome for appellant would have resulted if defense counsel had raised the issue and the court had excluded evidence of appellant's threat to Wendy and M.V. Appellant's concern is that the evidence of this threat would have made the jury more likely to believe he threatened Lovato than it otherwise would have been. The evidence that appellant threatened M.V. and Wendy was no stronger or more inflammatory than the evidence that he threatened Lovato. (See *Ewoldt, supra*, 7 Cal.4th at p. 405 [factor reducing potential for prejudice].) Indeed, defense counsel pointed the jury to myriad inconsistencies between the details described by these two witnesses, as well as between their accounts and Lovato's. The prosecution was certainly entitled to present the witnesses' testimony that they saw appellant with a gun: This was relevant to the charges, at a minimum, because it was circumstantial evidence of the reasonableness of Lovato's fear, which was an element of the charged criminal threat.⁶ According to Lovato's testimony, the threats were part and

⁵ Illustrating a similar point, federal cases applying the federal statute analogous to Evidence Code section 1101, do not consider "other act" evidence as coming within the prohibition of the statute if that evidence is "inextricably intertwined" with evidence of the charged crime in that either " 'constitute[s] a part of the transaction that serves as the basis for the criminal charge' " or is " 'necessary . . . to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime.' " (*U.S. v. Dorsey* (9th Cir. 2012) 677 F.3d 944, 951, quoting *United States v. Vizcarra-Martinez* (9th Cir.1995) 66 F.3d 1006, 1012.)

Rule 404, subdivision (b), of the Federal Rules of Evidence provides, "(1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. [¶] (2) *Permitted Uses; Notice in a Criminal Case*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

⁶ "In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat . . . was 'on its face and

parcel of the sequence of events; there was no reason for the jury to believe he saw the gun but disbelieve he heard the threats (or vice versa). The only theory suggested by the defense was that appellant, high and drunk, rummaged around Lovato's car but did not pull a gun on Lovato or threaten him—a theory at odds with the testimony of all three witnesses.

II.

Appellant contends his convictions must be reversed due to numerous instances of prosecutorial error. “ ‘ ‘ ‘A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ’ (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘ ‘ “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ’ ” ([*Espinoza*], at p. 820.)” (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*), quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) “Advocates are given significant leeway in discussing the legal and factual merits of a case during argument.” (*People v. Centeno* (2014) 60 Cal.4th 659, 666 (*Centeno*).) “When attacking the prosecutor's remarks to the jury, the defendant must show that, ‘[i]n the context of the whole argument and the instructions’ ([*People v.*] *Marshall* [(1996)] 13 Cal.4th [799,] 831), there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]’ (*People v. Frye* (1998) 18

under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,’ (4) that the threat actually caused the person threatened ‘to be in sustained fear for his or her own safety or for his or her immediate family's safety,’ and (5) that the threatened person's fear was ‘reasonabl[e]’ under the circumstances.” (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228.)

Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)” (*Centeno*, at p. 667.)

Appellant first argues that the prosecutor improperly opined in closing argument that appellant’s threats against Wendy and M.V. “were ‘crimes’ that had gone unpunished and that the jury should consider that when deciding the case.” According to appellant, the prosecutor tried this by presenting him as “the sort of person who threatens others,” leading to the conclusion that he threatened the victim in the present case and, “although he hasn’t always been properly charged and punished, this time he should be.” This characterization suggests the prosecutor asked the jury to punish appellant for his conduct on this occasion because he had gotten away with criminal conduct on other occasions and needed to be held accountable. But the prosecutor never suggested any *past* conduct in which appellant engaged in criminal conduct for which he escaped prosecution. The prosecutor referred to the threats against M.V. and Wendy as crimes that had not been charged, but he invited the jury to consider them as part of “all the evidence in this case,” not to consider the fact that other criminal conduct that had gone unpunished in deciding whether the threat against Lovato had been proven.⁷ The clear

⁷ To place the remarks in context: Discussing the evidence necessary to prove the charge of making a criminal threat, after describing the elements of the crime with specific reference to the charged victim, Lovato (e.g., “he threatened to kill or cause injury to the victim, Mr. Lovato”), the prosecutor stated, “[t]hreatening to shoot someone is a criminal threat” and “[i]t’s actually probably three different ones actually. Give me the keys or I’ll kill you. This is the last time I’m going to ask.” The prosecutor then suggested an example of a threat that might not rise to the level of a crime—a person yelling “I’m going to kill you” as he drives by a stranger at 35 miles per hour. Contrasting that scenario with what happened in the present case, the prosecutor argued, “This isn’t some person randomly walking by and saying something they shouldn’t. This is not some bum screaming nonsense outside of a house. These are very deliberate words, very clear threats with a very specific purpose in mind. And, interestingly, the defendant probably should be charged with more than one count. He committed a 422.”

Thus far, the prosecutor appeared to be referring to different counts based on the three separate threats Lovato described. Defense counsel objected that the prosecutor was arguing “counts not in front of the jury” and the court overruled the objection, saying the jurors knew there were two counts before them. The prosecutor then referred

implication of this portion of the prosecutor’s argument was that the fact that appellant threatened M.V. and Wendy and caused them fear supported concluding that the threats to Lovato reasonably caused him to fear for his safety.⁸ And the prosecutor was clearly commenting on the evidence, not—as appellant’s citation of *United States v. Young* (1985) 470 U.S. 1, 19) suggests—expressing his personal opinion that appellant was guilty.⁹

Appellant further complains that the prosecutor misled the jury “factually and legally” by stating that appellant was not prosecuted for his threats against M.V. and Wendy because he “said a lot more to Mr. Lovato than he said to them. . . .” With regard to the facts, this contention is not well-taken. Appellant’s assertion that Wendy and M.V. testified appellant “said as much to them as he did to Lovato” is not accurate. Wendy and M.V. described appellant making a single threat, standing either by the car in front of the house (M.V.) or outside the gate in their fence (Wendy) while they stood on or next to the porch. Lovato described three distinct threats, increasing in severity and urgency, while both men were standing by Lovato’s car. One might quibble about whether

explicitly to the threats against M.V. and “possibly” Wendy, saying the evidence “shows you that he committed more than he’s charged with” and “[t]hose are also crimes,” and telling the jurors that although appellant was not charged with crimes against M.V. or Wendy, they could “consider his words against them, his actions and the effect that they had on them when looking at all the evidence in this case. You can consider their evidence as to what the defendant did, how much it scared them and the effect that that had and the defendant’s actions had when he took those threats and turned them on to Mr. Lovato.”

⁸ The prosecutor made the same point regarding the couple who had been involved in the accident with Lovato: After discussing the escalating threats toward Lovato, the prosecutor argued, “The evidence doesn’t end there, right? He scares the other people off. I’m not talking about [Wendy and M.V.] I’m talking about the other two poor people who are just trying to exchange information. They leave. They run to their car and drive away from the scene. That is circumstantial evidence that you could use to infer what happened and what Lovato’s fear was.”

⁹ The prosecutor in *United States v. Young*, *supra*, 470 U.S. at pages 5 and 19, told the jury that he thought the defendant “intended to defraud” the victim in response to the defense argument that no one in the courtroom, including the prosecution, thought the defendant “intended to defraud” the victim.

appellant said “a lot” more to Lovato, but he certainly said “more.” The prosecutor’s comment does not amount to misrepresentation of the testimony.

As to the law, appellant argues that the prosecutor told the jury that appellant “would have needed to say ‘a lot more’ ” for his threat to M.V. and Wendy to be charged as a criminal threat. This mischaracterizes what the prosecutor said, which was simply that appellant was charged with crimes against Lovato, to which Wendy and M.V. were witnesses, because appellant did more harm to Lovato: “There [aren’t] any charges regarding them, true. He didn’t try to take their car. And he said a lot more to Mr. Lovato than he said to them, which is why Mr. Lovato is the charged victim in this case.” The point was not that the prosecutor *could not* have charged appellant with crimes against Wendy and M.V. but that a decision was made in recognition of the fact that Wendy and M.V. were primarily witnesses to the crimes committed against Lovato.

Appellant additionally contends the prosecutor distorted and misstated the standard of reasonable doubt, then exacerbated the error by telling the jury that some of the instructions it was given might not apply.¹⁰ “ ‘[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation].’ ” (*People v. Cortez* (2016) 63 Cal.4th 101, 130, quoting *People v. Marshall*, *supra*, 13 Cal.4th at p. 831.)

As the Attorney General concedes, the prosecutor’s statement that “this isn’t a reasonable doubt case” was inartful. Read in context, however, there is no reasonable likelihood the jurors understood it as suggesting they should not apply the reasonable doubt standard. After recognizing that the reasonable doubt standard is “the highest legal standard we have in the law,” the prosecutor stated, “And this isn’t a reasonable doubt

¹⁰ As defense counsel did not object to the prosecutor’s comments about the reasonable doubt standard, we could conclude this claim of misconduct has been forfeited. (*People v. Friend* (2009) 47 Cal.4th 1, 28.) We would be required to address it, however, because appellant contends the failure to object constituted ineffective assistance of counsel.

case. This either happened or it didn't. If everything the witnesses said is true, and you believe them, it supports the charges in this case." The point was that there was no question whether the words and conduct described by the witnesses amounted to the charged crimes; the jurors' job was simply to decide whether to believe the prosecution witnesses as to what occurred.

We are not persuaded by appellant's suggestion that the jurors could have concluded the reasonable doubt standard "did not apply" because the prosecutor told them some of the instructions they were given might be inapplicable and some would be more important than others. These comments were not directed to the reasonable doubt standard; they followed the prosecutor's statement that the court had given a lot of instructions, the prosecutor was going to "distill it down a little bit to . . . the law that applies to this case specifically," and depending on the evidence, some of the instructions were "going to be more important than others." The prosecutor's argument echoed the court's instruction that some of its instructions might not apply, depending on the jury's factual findings. The jury could not have understood this to mean that the instruction defining reasonable doubt might not apply to "this case specifically," or that the reasonable doubt instruction was unimportant, because the instructions given by the court made clear its fundamental role in the trial. The trial court correctly explained the reasonable doubt standard and repeatedly emphasized that appellant could not be convicted unless the prosecution proved his guilt beyond a reasonable doubt. Since it was the jury's factual findings that might render an instruction inapplicable, and those findings could only be established by proof beyond a reasonable doubt, the reasonable doubt instruction itself could not have been seen as inapplicable. Furthermore, the court instructed that if the attorneys' comments differed from the instructions, the jurors were required to follow the instructions. Appellant's argument is premised on the opposite assumption—that the jury would ignore the court's instructions in favor of an unfounded and conflicting inference from the prosecutor's argument.

Appellant describes the prosecutor as having stated that " '[w]hen you talk about reasonable doubts in this world' you just have to 'be convinced in the truth of the

charges,’ ” thus diluting the reasonable doubt standard. This formulation suggests a connotation that does not emerge from the remarks in context. After stating that defense counsel was likely to point to many inconsistencies in the evidence and urging that the witnesses had no reason to lie, the prosecutor argued, “[w]hen you talk about reasonable doubts in this world, the jury instructions say that the proof doesn’t have to eliminate all possible doubt because everything in life is open to some imaginary or possible doubt. You have to be convinced in the truth of the charges.” While this paraphrase of the reasonable doubt instruction omitted the degree of certainty—“abiding conviction that the charge is true”—the prosecutor’s focus was on the instruction’s statement that it was not necessary to eliminate all possible doubt, which he stated accurately. He did not tell the jurors they “just” needed to be convinced, and he certainly did not suggest he intended any meaning other than what was stated in the court’s instructions.

Appellant’s interpretation of the prosecutor’s comment that “this is a level playing field” as implying that the parties “shared the same burden of proof” takes the comment out of context. The prosecutor stated his point in limited terms: “This is a level playing field. We both have the subpoena power of the court to produce evidence, documents and witnesses. We have the same things we can produce through a trial; use the power of the court to subpoena witnesses or documents or other evidence.” The comment did not suggest any connection to the burden of proof.

Appellant’s contention that the prosecutor committed misconduct by directing “derisive comments and insinuation” toward defense counsel is also unavailing. “A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel.” (*Hill, supra*, 17 Cal.4th at p. 832.) The comments upon which appellant bases his claim, however, were not as egregious as appellant contends.

The primary instances in which the prosecutor discussed defense counsel’s conduct (as opposed to his treatment of the evidence) were observations that defense counsel cross-examined Lovato for an hour or hour and a half while the prosecutor’s direct lasted only 15 minutes, and that defense counsel asked “[a] lot of confusing

questions, a lot of the same questions over and over again.” The prosecutor said “it blows my mind sometimes” when such questions are asked, asserted that defense counsel asked many such questions and said, “we have kind of a statement ‘Garbage in garbage out.’ If the question doesn’t make sense, you’re not going to get anything out of the answer.”

The overall point of this portion of the prosecutor’s argument appears to be that although the case was not complicated, defense counsel was making it seem to be by asking confusing questions that could not be answered clearly, such as “Isn’t it true you didn’t do this?” The prosecutor could have framed his point in a manner less critical of defense counsel’s strategy, but he did not impugn counsel’s character or integrity, and the remarks were softened by the prosecutor’s statements that he did not think defense counsel was “trying to ask confusing questions” and “sometimes lawyers, we ask questions like that unintentionally.” Appellant exaggerates the situation in stating that defense counsel spent an inordinate amount of time defending himself against the prosecutor’s inappropriate remarks. Defense counsel told the jurors that he believed his questions “had merit and drove at the heart of the issue, which is mainly who can give us a clear picture of what happened that night,” and asked that if they felt he asked unfair questions, or questioned Lovato too long, they not let this bias appellant, who did not get to decide what questions defense counsel asked. This “self-defense” comprised a single paragraph, approximately two-thirds of a page of the reporter’s transcript, out of the 24 pages of the defense closing argument.

The other instances of alleged misconduct were comments on defense counsel’s treatment of the evidence, not on defense counsel himself, and at worst were “clearly recognizable as an advocate’s hyperbole.” (*People v. Sandoval* (1992) 4 Cal.4th 155, 184.) Telling the jury that defense counsel was “probably going to ignore a lot of evidence that points to his client’s guilt that I’m going to ask you to focus on” was essentially stating the obvious, that each attorney would focus on the evidence favorable to his side. The statement, “I think [defense counsel] ignores reality,” was a reference to defense counsel arguing that certain things *did not* happen because a witness said he or

she did not *see* them happen, when the circumstances were such that a given witness did not necessarily see everything that occurred. Appellant claims the prosecutor falsely accused defense counsel of calling witnesses liars, but the prosecutor's characterization was not entirely inaccurate: While defense counsel did not expressly argue the witnesses were lying, in emphasizing inconsistencies between the witnesses' accounts, he insinuated as much.¹¹ Finally, with regard to the prosecutor's argument that defense counsel falsely told the jury it had to believe appellant pointed a gun in order to find him guilty, appellant correctly points out that the prosecutor erred in stating that defense counsel never responded to this challenge. Defense counsel did respond, acknowledging that the prosecution did not have to prove a gun existed but arguing that the question was important because, among other things, if the witnesses were all wrong about appellant having a gun, they could have been wrong about other facts in the case. It is doubtful the jury could have been misled by the prosecutor's mistaken claim that defense counsel failed to address the issue, as defense counsel's response was significantly longer than the prosecutor's initial remarks.

III.

Appellant argues that the trial court's imposition of concurrent sentences on his convictions violated section 654. "Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct." (*People v. Deloza* (1998) 18 Cal.4th 585, 592; *People v. Corpening* (2016) 2 Cal.5th 307, 311.) The prohibition includes concurrent sentences; where section 654 applies, sentence must be imposed on the most serious of the offenses and on the other offenses must be imposed and stayed. (*Deloza*, at p. 592.) Respondent agrees that appellant's sentence on count 2 must be

¹¹ For example, defense counsel argued that if the jurors believed M.V., "what Wendy says happened couldn't have happened" and "what Mr. Lovato says happened could not have happened," and "if you believe Mr. Lovato's testimony entirely without any questions, that would require you to completely and entirely disregard the testimony of Wendy and [M.V.]"; counsel told the jury, "I just don't believe" Lovato's account of the incident, and, regarding the account of appellant pointing a gun at Wendy and M.V. asked, "did Wendy make that up?"

stayed, focusing on the fact that the carjacking and criminal threats comprised an indivisible transaction in which appellant had a single intent and objective. We concur. The abstract of judgment must be corrected to reflect that the sentence on count 2 is stayed.

IV.

Appellant additionally contends that the trial court abused its discretion in refusing to strike his prior robbery conviction pursuant to section 1385.

“ ‘[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, “in furtherance of justice” pursuant to Penal Code section 1385[, subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.’ ” (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*), quoting *People v. Williams* (1998) 17 Cal.4th 148, 161.) “Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Carmony*, at p. 378.) A trial court does not abuse its discretion in denying such a motion to strike “unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) An abuse of discretion will be found only in “limited circumstances[.]” such as “where the trial court was not ‘aware of its discretion’ to dismiss” or “considered impermissible factors in declining to dismiss.” (*Id.* at p. 378.)

Appellant contends the trial court improperly denied the motion to strike due to its frustration with appellant's refusal to accept a plea deal, failing to acknowledge the impact on this decision of a recently diagnosed intellectual disability, and insufficiently considering appellant's social history, mental health issues and mitigating factors that took him outside the spirit of the three strikes law.¹²

The trial court explained at the outset of the hearing that it had read and considered the probation report, "the 60-page report that you provided, sentencing memo, as well as the psychiatric evaluation information as it relates to this case," and heard defense counsel's argument that alcohol and drugs played a significant part in what happened during the offense, and "we know now with his borderline intellectual functioning disorder, he can't comprehend things as quickly as we do," which counsel believed "played a large role in not only what happened that night, but what led up to the situation." The court then discussed at some length its pretrial efforts, together with

¹² According to the probation report, appellant, just short of 31 years of age at the time of the present offenses, reported a history of substance abuse beginning at age 14 and including alcohol, marijuana, cocaine, and methamphetamine. An assessment prepared by the Alameda County Public Defender's Office related that appellant was surrounded by family members who abused drugs and alcohol, dropped out of high school in his senior year, had "an extensive employment history" but "could not sustain long-term employment," reported a history of depression, and was admitted to a psychiatric hospital on three occasions between December 2015 and March 2016. The mental health clinician who treated him at the Santa Rita jail diagnosed him with "Amphetamine Induced Psychosis and Post-Traumatic Stress Disorder with Polysubstance Dependence," and after an evaluation in November 2016 he was diagnosed with "Borderline Intellectual Functioning (BIP)," described as "an intellectual disability that causes serious deficits in academic achievement and effective learning." The public defender's assessment stated that "alcohol and drugs have had a strong hold on [appellant's] life, a factor which he says was present when he was involved in the matter at hand," that appellant saw his current situation as a "wake-up call" and had shown initiative in applying to residential programs to address his mental health and addiction issues, that it was "important to take into account [his] severe mental health issues and the possibility of an intellectual processing disorder that may have influenced his life trajectory," and that despite his struggles he had demonstrated "important prosocial skills based on his employment history, prior engagement in services, and determination to succeed."

defense counsel, to explain to appellant the nature of the case and potential consequences, and appellant's adamant refusal to accept a deal because he insisted he was innocent. The court found that appellant refused to accept any responsibility for the offense despite compelling evidence of his guilt and found applicable the aggravating factors that appellant threatened great bodily injury, took advantage of the victim having stopped to exchange information after an accident to exchange insurance information, had "prior violent conduct, prior convictions" and "was on probation and performed poorly."

To appellant, the court's references to having spent considerable time with him, including while a full jury panel was waiting, trying to discuss a proffered "4-year deal at 50 percent" while appellant refused to listen, demonstrate that the court denied the motion to strike in "sheer frustration" with appellant's refusal to take the deal and "dismay" over appellant having "needlessly consumed judicial time and resources." Our reading of the transcript leads us to conclude the court's frustration was not with wasted judicial resources but with appellant's refusal to accept responsibility for his actions. The court referred to intensive efforts both the court and counsel made to explain the case and the proposed deal, and "get him to understand," while appellant "wouldn't listen, and he wouldn't have it." Ultimately, the court concluded, "there's nothing really I can say or you can say that will bring it to the point of what he did was wrong. And he doesn't want to accept any responsibility. [¶] So I'm asked here, what, to strike his strike because he already told me he didn't do anything? We looked at the video, we saw the witnesses, we saw the people tremble. And then I'm asked to make a concession and say that there's some way I can make a finding? I can't do that as a matter of law. Remember, we talked about that. And so that's where we're at. [¶] So what I have here a person who doesn't accept his responsibility" even in the face of the evidence.

"[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony, supra*, 33 Cal.4th at p. 378.) Where the record is silent, we presume the court

correctly applied the law; where the record demonstrates the trial court balanced the relevant facts and “reached an impartial decision in conformity with the spirit of the law,” the reviewing court affirms even if it might have ruled differently. (*Ibid.*)

Appellant’s criminal history is significant. Prior to the present offenses, he had been convicted in April 2016 of misdemeanor possession of a controlled substance (Health & Saf., § 11377), in 2014 of misdemeanor driving under the influence (Veh. Code, § 23152, subd. (a)), in 2010 of felony driving under the influence (Veh. Code, § 23152, subd. (b)) and misdemeanor resisting arrest (Pen. Code, § 148, subd. (a)), in 2007 of felony robbery (Pen. Code, §§ 211, 487, subd. (c)), and in 2006 of felony assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), misdemeanor driving under the influence (Veh. Code, § 23152, subd. (a)) and misdemeanor driving without a valid license (Veh. Code, § 12500, subd. (a)). He had been sentenced to prison twice, and was on probation when he committed the present offenses. While the court did not discuss appellant’s social history, mental health issues, substance abuse and intellectual disability on the record, it expressly acknowledged having read and considered the reports in which these factors were discussed at length. It found aggravating factors supported by the record, and its heavy emphasis on appellant’s refusal to take responsibility for his conduct was not improper. We cannot find the court abused its discretion in refusing to view appellant as outside the spirit of the three strikes law.

V.

As indicated above, appellant’s sentence included a five-year consecutive term pursuant to section 667, subdivision (a)(1), for his prior robbery conviction. Under current law, a trial court “is required to impose a five-year consecutive term for ‘any person convicted of a serious felony who previously has been convicted of a serious felony’ (§ 667(a)), and the court has no discretion ‘to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.’ (§ 1385(b).)” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

Well after briefing in this case was complete, on September 30, 2018, the Governor signed Senate Bill No. 1393, which, “effective January 1, 2019, amends

sections 667(a) and 1385(b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)” (*Garcia, supra*, 28 Cal.App.5th at p. 971.) Appellant argues that he is entitled to retroactive application of the new laws and, therefore, a remand for resentencing. Respondent has acknowledged that because the amendments are ameliorative, they apply retroactively to cases that were not yet final when they became effective. (*Garcia*, at pp. 972–973; *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308; *In re Estrada* (1965) 63 Cal.2d 740, 742, 744; *People v. Francis* (1969) 71 Cal.2d 66, 75.) This is such a case.¹³

On the merits, respondent argues that no remand is necessary because the trial court’s remarks at sentencing indicate it would not have dismissed the prior if it had discretion to do so. In the context of Senate Bill No. 620, which gave trial courts discretion to strike allegations or findings subjecting a defendant to lengthy sentence enhancements under section 12022.53 where such discretion previously had been prohibited (former § 12022.53, subd. (h)), courts have held that “if ‘the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.’ ” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*), quoting *People v. Gamble* (2008) 164 Cal.App.4th 891, 901.) In general, however, “ ‘[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to “sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court,” and a court that is unaware of its discretionary authority cannot exercise its informed discretion.’ ” (*McDaniels*, at p. 425, quoting *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

¹³ “ ‘[F]or the purpose of determining the retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.’ ” (*People v. Vieira* (2005) 35 Cal.4th 264, 305–306, quoting *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.)

Here, as described above, the trial court declined to exercise its discretion to dismiss the 2007 robbery conviction for purposes of three strikes sentencing because of appellant's refusal to take any responsibility for his criminal conduct, two aggravating factors based on the facts of the present offense, history of prior violence and convictions, and poor performance on probation. Noting that the court also imposed the maximum restitution fine, respondent argues that the court's expressed view of appellant's culpability indicates it would not have dismissed the prior robbery for purposes of the section 667, subdivision (a)(1), five-year enhancement if it had had discretion to do so.

The court did not, however, express an intention to impose the harshest sentence possible. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand not required where court expressed view of defendant as "kind of individual the law was intended to keep off the street as long as possible"].) The court noted that no gun was found, expressed doubt as to whether the offense involved any sophisticated planning, and imposed a sentence one year and four months shorter than the sentence recommended by the probation department and requested by the district attorney. The prior serious felony conviction was nine years old when appellant committed the present offense, and appellants' offenses during the intervening years did not involve violence and appear to have been related to substance abuse (misdemeanor possession of a controlled substance in 2016, misdemeanor driving under the influence in 2014, felony driving under the influence in 2010).

The trial court had no reason to consider dismissal of the prior for purposes of the five-year section 667, subdivision (a)(1), sentence enhancement, as it had no discretion to order dismissal at the time appellant was sentenced. The Legislature has now determined that trial courts shall have such discretion and, as we have said, appellant is entitled to retroactive application of the new law. The court's refusal to dismiss the prior for purposes of the three strikes law, reflecting its determination that appellant did not fall "outside the spirit" of that law (*Carmony, supra*, 33 Cal.3d at p. 378), does not compel a conclusion that the court would have declined to exercise its discretion to strike a nine-year-old prior conviction that added five years to appellant's sentence. As the record

does not clearly indicate how the court would have ruled, appellant is entitled to an informed exercise of the trial court's discretion in the first instance, regardless of any assessment this court might make as to whether it is reasonably probable the sentence will be modified on remand. (*McDaniels, supra*, 22 Cal.App.5th at p. 427.)

DISPOSITION

The abstract of judgment shall be corrected to reflect that the sentence on count 2, making criminal threats, is stayed. The matter is remanded to the trial court for resentencing pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by Senate Bill No. 1393, effective January 1, 2019. In all other respects, the judgment is affirmed.

Kline, P.J.

We concur:

Stewart, J.

Miller, J.

People v. Walker (A151650)